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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-191

DELMAR L. MARKHAM and BRUNO PIET,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, by their Attorneys, James D. O'Connell and Thomas H. Ramsey, pray that a Writ of Certiorari issue to review the judgment heretofore entered against them by the United States Court of Appeals for the Seventh Circuit.

1. OPINIONS BELOW

Petitioners were convicted in the United States District Court for the Northern District of Illinois, Eastern Division, by a jury, on November 13, 1973, of a single violation of Title 18—United States Code—§659. On December 19, 1973, and subsequent to the trial court's denial of Petitioners Motion for New Trial, and sentencing, timely Notice of Appeal was filed (Appendix A). On May 20, 1974, the Court of Appeals for the Seventh Circuit affirmed Petitioners convictions. The written opinion of the Court is annexed at Appendix B. On July 18, 1974, the Court of Appeals denied Petitioners application for Rehearing En Banc, said order being set forth at Appendix C.

2. JURISDICTION

The opinion and judgment of the Court of Appeals for the Seventh Circuit was entered on May 20, 1974. Rehearing was denied on July 18, 1974. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28—United States Code—§1254(1).

3. QUESTIONS PRESENTED

Petitioners present the following questions for this Honorable Court's consideration:

I.

Did the Trial Court commit reversible error in overruling Petitioner's Motion to suppress evidence wherein said evi-

dence was the product of a warrantless and otherwise illegal search and seizure made on private property in violation of the Fourth Amendment to the Constitution?

II.

Did the Trial Court commit reversible error by permitting into evidence certain items seized without a warrant and pursuant to an exploratory search made prior to obtaining Markham's alleged volutary consent to search his privately leased premises in violation of the Fourth Amendment to the Constitution?

III.

Did the Court of Appeals misconstrue and misapply the thrust and intent of this Honorable Court's recent decision in United States v. Matlock, 415 U.S. 164, 42 U.S.L.W. 4252 (1974)?

4. CONSTITIONAL AND STATUTORY PROVISIONS

(a) The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched and the person or things to be seized."

(b) Title 18—United States Code—§659, provides in pertinent part:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception

obtains from any . . . railroad car, wagon, motor truck, or other vehicle, . . . station, station house, platform, or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part of, or which constitute an interstate or foreign shipment of freight, express or other property, or whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen . . ."

5. STATEMENT OF THE CASE

The record in the matter at bar reflects that the Government accused Delmar L. Markham, Bruno Piet and Russell Johnson with the unlawful possession of 29 cartons of Black and Decker lawn trimmers knowing that said trimmers had been stolen from the Chippewa-McClain Motor Freight Company, at Bedford Park, Illinois, the goods being part of an interstate shipment.

At trial, Russell Johnson, testified for the Government to the effect that he and Piet had been responsible for the actual theft of the lawn trimmers. That in particular, Piet had approached him on March 19, 1973, and advised that he had some merchandise. Johnson, a truck driver, finished his work at Chippewa and left the premises. Once away from the terminal, Johnson looked inside his truck and examined the merchandise that Piet had placed there. (Tr. 183-191).* Johnson then called Markham and asked if he wanted to buy the trimmers. (Tr. 191-192). According to the witness, Markham agreed to buy the merchandise, and gave Johnson directions for delivery. (Tr. 192).

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* Note: "Tr" refers to the trial transcript with appropriate pagination.

Following Markham's instructions, Johnson proceeded to Able Warehouse and delivered the trimmers to a man named Frank. (Tr. 193). Johnson then related that the following day (March 20th), he talked to Markham again, and the deal was finalized.

On March 23, 1973, Russell Johnson was interviewed by the F.B.I. in relation to the alleged theft at which point Johnson admitted the theft and implicated both Markham and Piet. (Tr. 196-197).

On November 13, 1973, the jury returned a verdict of guilty as charged in the Indictment as to both Markham and Piet, and on December 19, 1973, Piet was sentenced to a term of eighteen months and Markham to a term of three years. On direct appeal to the Seventh Circuit, Petitioners convictions were affirmed.

6. REASONS FOR GRANTING THE WRIT

Petitioners, herein, contend that the Trial Court failed to recognize specific violations of Petitioners fundamental constitutional right to be free from unreasonable searches and seizures and pursuant thereto, permitted evidence to be presented at trial in violation of the Fourth Amendment to the Constitution. The Court of Appeals affirmed the conviction obtained in the District Court.

Petitioners also contend that during the course of appeal, the Seventh Circuit, in affirming the conviction, relied heavily upon the rationale of the Supreme Court as set out in *United States v. Matlock,* 415 U.S. 164, 42 U.S.L.W. 4252 (1974), but that in so doing, misconstrued and misapplied the thrust of this Court's decision. That had the Court of Appeals properly applied the ramifications of *Matlock,* reversal would have been required.

I.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN OVERRULING PETITIONER'S MOTION TO SUPPRESS EVIDENCE WHEREIN SAID EVIDENCE WAS THE PRODUCT OF A WARRANTLESS AND OTHERWISE ILLEGAL SEARCH AND SEIZURE MADE ON PRIVATE PROPERTY IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION?

On November 12, 1973, the trial court held a hearing on Petitioners Motion to suppress evidence. During the course of the hearing, testimony was taken from one Frank Smith, a fork lift operator at Able Warehouse. (H-15).** Smith related that he first met Petitioner Markham in January, 1973, when Petitioner inquired about available warehouse space. (H-16, 17). Smith showed Markham what was then available, but stated that he was not authorized to quote rental rates and that Markham would have to contact the owner of Able Warehouse to negotiate a lease and a rental price. (H-18). Smith then testified that he was aware that Markham did, in fact, lease space at Able Warehouse and that the space was leased to Markham during the month of March, 1973, and for several months thereafter. (H-19).

The witness related that on March 23, 1973, two F.B.I. Agents came to the warehouse and inquired of the witness whether a "Lee Markham" worked there. The Agents were told that no one by that name worked at the warehouse. The agents continued theier inquiry as to the ownership of the facility. Again, Smith related that "Lee Markham" was not the owner of Able. (H-20). Agent Flanagan then related that he had information that Markham worked for

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** Note: "H" refers to hearing transcript with appropriate pagination.

Able. Smith denied that Markham worked there, but volunteered information to the effect that a "Lee" rented space in the warehouse. (H-20).

Agent Flanagan asked to see Markham's space, and indicated that he was particularly interested in locating some Black and Decker lawn trimmers that had been stolen. Smith agreed to show the agents the space but denied any knowledge of Black and Decker lawn trimmers. When Smith and the agents arrived at Markham's space, the door was closed, but unlocked. (Earlier, Smith had testified that Markham had rented space that was entirely enclosed [H-19]). Subsequent to opening the door, the agents discovered several cartons of Black and Decker tools. (H-21).

Smith related that the agents remained in the room for about 15 minutes; that he had made no attempt to contact Markham and secure the lessee's permission to let the agents into the space; and that he knew in advance that the agents were looking for particularized merchandise. (H-21, 22).

Smith then related that the agents ordered him to lock the room and not to let anyone take any merchandise out of the room including Markham. (H-23).

On Monday, March 26, 1973, Smith testified that Agent Flanagan and another agent came back to the warehouse, this time in the company of Markham. At the agents direction, Smith unlocked the room and the agents and Markham entered. The Black and Decker cartons were thereupon removed from Markham's storage space by the agents. (H-23, 24).

At the termination of the hearing, the trial court denied Petitioners Motion to Suppress Evidence (H-77, 78).

The issue herein polarizes on the warrantless exploratory search conducted by Government agents on March 23, 1974, of privately leased warehouse space; and the effective seizure of Black and Decker merchandise subsequent to said search.

Petitioners,[1] maintain that the search conducted by Government agents on March 23, 1974, violated the provisions and protections of the Fourth Amendment to the Constitution and that the evidence discovered and seized should have been excluded from introduction during the trial in the matter at bar.

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The record reflects that on the morning of March 23, 1974, Special Agents Flanagan and Roberts interviewed Russell Johnson in connection with the alleged theft of Black and Decker lawn trimmers. During the interview,

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[1] Relative to Petitioner Piet's standing to challenge the validity of a search and seizure, this Court has held that a person "aggrieved" is one who has been charged with the possession of certain contraband. *Jones v. United States*, 362 U.S. 257 (1960); see also: *United States v. Love*, 472 F. 2d 490 (5th Cir. 1973); *United States v. Legato*, 480 F. 2d 408 (5th Cir. 1973); and *United States v. Allsenberrie*, 424 F. 2d 1209 (7th Cir. 1970). In *Allsenberrie*, the 7th Circuit said: "Thus the requirement of the *Jones* case is not that proof of possession alone be sufficient to convict but only that possession be an essential element of the offense." On the record at bar, Piet has standing to challenge the search.

Johnson made a full confession regarding the theft and directed the agents to Abel Warehouse where he allegedly delivered the merchandise on the instructions of Petitioner Markham. Armed with this information, the agents proceeded to Abel Warehouse and subsequent to some discussion with fork lift operator Smith, obtained permission to "inspect" the Markham storage space. Upon discovering the Black and Decker cartons, the agents instructed Smith to lock the room and not permit entry or removal of any merchandise from the room by anyone including Petitioner Markham. The record also reflects that the agents did not attempt to obtain a search warrant despite the fact that they had more than likely sufficient probable cause to apply for a warrant through the interview with the thief, Johnson; and despite the fact that the information was received by the agents during the course of a normal work day when a Magistrate was available to issue the warrant.

The issue here consists of two interrelated elements: (a) conducting an exploratory search without a warrant; and (b) the search of private premises with the "consent" of a third party.

(a). The Fourth Amendment forbids unreasonable, warrantless searches and the overwhelming wealth of case law prohibits warrantless searches except in a few, narrowly defined instances. *Agnello v. United States,* 269 U.S. 20 (1925).[2]

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[2] Automobile searches where there exists a likelihood that the evidence will be removed; *Carroll v. United States,* 267 U.S. 132 (1925); *Coolidge v. New Hampshire,* 403 U.S. 443 (1971); *Chambers v. Maroney,* 399 U.S. 42 (1970). Search incident to a valid arrest, *Chimel v. California,* 395 U.S. 752 (1969). Seizure of evidence found in "plain view." *Harris v. United States,* 390 U.S. 234 (1968); and searches pursuant to a valid consent, *Davis v. United States,* 328 U.S. 582 (1945).

The Fourth Amendment is designed for the protection of the privacy of the individual, or, as Mr. Justice Holmes put it, "his right to be let alone." *Davis v. United States,* 328 U.S. 582 (1945). This Court has described this right as "one of the unique values of our civilization," *McDonald v. United States,* 335 U.S. 451 (1948); and "the very essence of constitutional liberty." *Gouled v. United States,* 255 U.S. 298 (1921).

> "The security of one's privacy against arbitrary intrusion by the police is 'at the core of the Fourth Amendment ***,' *Wolf v. Colorado,* 338 U.S. 25. An intrusion by the police in the form of a search and seizure is arbitrary, and therefore 'unreasonable, if not authorized by law.***"
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> *Cohen v. Norris,* 300 F. 2d 24 (9th Cir. 1962).

The activity prohibited by the Fourth Amendment is the invasion of privacy by means of unreasonable searches and seizures. Generally, a search is considered to be unreasonable if it is not conducted under the authority of a search warrant issued by an appropriate magistrate.[3]

The word "houses" in the Fourth Amendment has been interpreted by the courts to include private offices and the private portions of businesses as well as dwelling houses and the curtilages which surround them:

> "To be sure, the Court has been far from niggardly in construing the physical scope of Fourth Amendment protection. A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a persons 'house' and so, of course may an apartment.

[3] The exceptions to the general rule are set out in Note 2, *supra.*

> An automobile may not be unreasonably searched. Neither may an occupied taxicab. Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that jail shares none of the attributes of privacy of a home, an automobile, and office or a totel room.***"
>
> *Lanza v. New York,* 370 U.S. 139 (1962).

It is well settled that the Supreme Court has extended the protections of the Fourth Amendment to offices and other places of business. *Gouled v. United States,* 255 U.S. 298 (1921); and *Go-Bart Importing Co. v. United States,* 282 U.S. 344 (1931). Likewise, officers who gain entrance to private premises under the color of law, *i.e.,* under the authority of their office, must have a legal basis for the intrusion. In the leading case, a police lieutenant received information that unknown persons were smoking opium in a particular hotel. The officer and four Federal Narcotics Agents proceeded to the hotel and knocked on the door, and upon inquiry from within, identified themselves. After a short delay, the defendant opened the door and the lieutenant said, "I want to talk to you a little bit." The defendant stepped back acquiescently and admitted the officers to the room. The defendant denied that there was the smell of opium in the room and was then placed under arrest. A subsequent search disclosed opium and a warm opium pipe. In holding the search to be illegal, the Supreme Court said:

> "Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private [living] quarters under color of his office and the law which he personifies must then have some valid basis in law for the in-

> trusion. Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state, where they are the law."
>
> *Johnson v. United States,* 333 U.S. 10 (1948).

Similarly, where there is evidence in the record to support the proposition that the purpose of the entrance onto private premises was to conduct a search without any legal justification, the subsequent search and seizure will be held to be illegal. This is the rule even where the entrance is ostensibly for another purpose. Thus, where two plain-clothes officers and the victim of a robbery went into the home of a suspect to "talk with him" and, after gaining entrance, saw some of the stolen articles, the court held the seizure to be illegal. *United States v. Evans,* 194 F. Supp. 90 (D.C.D.C. 1961).

Historically, the one theme that runs through the Supreme Court's decisions relative to warrantless searches is a decided preference for searches and seizures *with* a warrant. As the Court has repeatedly asserted, resort to the warrant process "interposes an orderly procedure," *United States v. Jeffers,* 342 U.S. 48 (1951), involving "judicial impartiality" whereby "a neutral and detached magistrate" *Johnson v. United States,* 333 U.S. 10 (1948), can make "informed and deliberate determinations" *Aguilar v. Texas,* 378 U.S. 108 (1964), on the issue of probable cause. To leave such decisions to the police is to allow "hurried actions" by those "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* supra.

In *Agnello v. United States,* 269 U.S. 20 (1925), this Court held that "belief, however well founded, that an article is concealed in a dwelling [house] furnishes no justification for a search of that place without a warrant." Moreover, since this Court's decision in *Chimel v. California,* 395 U.S. 752 (1969),[4] consideration must be given to the proposition of when, if ever, a warrantless search of premises could be upheld on the grounds that an emergency would make resorting to the warrant process impracticable. A case in points is *Vale v. Lousiana,* 399 U.S. 30 (1970), wherein the police set up a surveillance of a house in which Vale was thought to be residing because they had two warrants for his arrest issued after his bond had been increased on a pending narcotics charge. When another person drove up to the house and sounded his horn, Vale came out, walked to the car and had a conversation with the driver, looked about cautiously, entered his house, came back out a few minutes later, looked about again, and proceeded to the car. Convinced that they had just witnessed a sale of narcotics, the officers approached. Vale hurried back towards the house, while the driver of the car started away. The driver was apprehended, but not before he swallowed some object. Vale was arrested on his front steps, after which the police took him inside and made a cursory inspection of the house to ascertain if anyone else was present. Minutes later, Vale's mother and brother entered the house, at which point the police searched the house and found a quantity of narcotics in the rear bedroom. The Louisiana Supreme Court upheld the search

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[4] The decision handed down in *Chimel, supra,* overruled the long standing rule postulated by the decisions in *Harris v. United States,* 331 U.S. 145 (1947); and *United States v. Rabinowitz,* 339 U.S. 56 (1960), which held that warrantless searches would be upheld if conducted pursuant to a valid arrest.

on the basis that the search had occurred in the immediate vicinity of the arrest. This Court reversed.

In the matter at bar, the record reflects that no attempt was made by the Government agents to secure a search warrant of the premises located at Able Warehouse, notwithstanding the facts that (1) there was apparently sufficient probable cause to support an application for a warrant; (2) the information gathered by the investigating agents was obtained during the course of a normal working day when a magistrate was readily available; (3) the investigators knew exactly what contraband they were seeking, as well as the identity of the suspect; and (4) there existed no showing or suspicion that any exigent circumstances were operating which would have made applying for a warrant impracticable.

On these facts, then, and following the yardstick set out by this Honorable Court, i.e., "that the police must, whenever practicable, obtain advance judicial approval of searches and seizures," *Terry v. Ohio,* 392 U.S. 1, at 20 (1968); the warrantless search and seizure of contraband from Petitioner Markham's privately leased warehouse space located at Able Warehouse, violated the protections of the Fourth Amendment and thereby must be declared unreasonable and illegal. The evidence obtained as the result of said illegal search should have been suppressed.

(b) The second element relative to this issue, involves the alleged "consent" to search the Markham warehouse space obtained from the fork-lift operator, Frank Smith. The Court of Appeals for the Seventh Circuit, as did the trial court, relied upon this consent as validating the warrantless search of the warehouse space and the ultimate seizure of the contraband Black and Decker lawn trimmers. (Op. of the Court, pp. 4. 5).

It is Petitioner's position that the determination rendered by the Court of Appeals postulates an erroneous conclusion of law relative to the element of consent as applied to the search and seizure effected by Government agents on March 23, 1973.

In affirming Petitioner's conviction, the Court of Appeals applied the following rationale:

> "In *United States v. Matlock,* 415 U.S. 164, 42 US LW 4252 (Feb. 19, 1974), the Supreme Court reiterated that permission to search may be obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects. 'The authority which justifies third-party consent does not rest on the law of property . . . [but rather] on mutual use of the property by persons generally having joint access or control for most purposes' Id. at 4254 n. 7. Frank Smith introduced himself as the warehouse foreman and stated that he was in charge in the owner's absence . . . Smith freely consented to the F.B.I. search, and he led the agents to the area where Markham's goods were stored . . . Whatever Smith's title, it is clear that Markham was aware, as a practical matter, that Smith and the warehouse owner—who possessed the only keys to the common storage room—had access and control over the common area. We find, therefore, that Markham had no reasonable expectation of privacy respecting the storage of his goods, see, *United States v. Eldridge,* 302 F. 2d 43 (4th Cir. 1962), and assumed the risk that the persons in charge of the facility might willingly and voluntarily grant permission for agents to enter and search the common storage area. See, *United States v. Matlock, supra; Von Eichelberger v. United*

States, 252 F. 2d 184 (9th Cir. 1958)." (Op. of the Court, pp. 3, 4.)

In applying the foregoing rationale, the Court of Appeals apparently overlooked several significant facts, i.e. (a) Smith testified at trial that he was a fork-lift operator; [Tr. 15]; (b) Smith testified that Markham rented the smaller of the spaces available because the room had a door and could be kept locked to protect his merchandise [Tr. 17]; (c) Smith testified that he did not have the authority to quote rental prices and that Markham would have to contact the owner of the warehouse in order to consummate the lease [Tr. 18]; (d) Smith testified that upon viewing the Black and Decker lawn edgers in Markham's room, the agents ordered him to lock the door and not to let anyone take anything out of the room, including Markham [Tr. 23]; (e) Markham testified at the suppression hearing that he did possess a key to his rented space and that he had given specific instructions that his space was to be kept locked at all times [H. 42]. There are numerous other discrepancies in the facts utilized to support the opinion affirming the conviction below but the issue of consent as related to a valid search pivots on the foregoing. The facts in the matter at bar, are not complex and can be easily itemized:

1. Government agents investigating an alleged theft of goods from interstate commerce, received information that some of the goods had been delivered to Able Warehouse.
2. The information relative to the stolen merchandise was received by the agents from a person actually involved in the theft.
3. The Government agents received their information on a Friday morning, a regular working day, and

under circumstances whereby a magistrate was readily available to make a determination as to probable cause upon the consideration of an application for a search warrant.

4. The Government agents failed to make an application for search warrant.

5. The Government agents entered the premises at Able Warehouse under the "color of law" and thereby requested and received the consent of an employee of the Warehouse to search a privately leased room, which was fully enclosed, thus eliminating the contents thereof from the plain view of the agents.

6. The Government agents, upon determining the contents of the leased room, ordered the employee to lock the door and not to permit anything to be removed by anyone, thus the entire contents of the room were effectively seized.

The Government seeks to justify the search and seizure of goods from Petitioner Markham's leased warehouse space on the grounds that the fork-lift operator, Frank Smith, voluntarily consented to the search. The Court of Appeals upheld this proposition and affirmed conviction. Petitioners respectfully suggest that the Court of Appeals, in affirming the conviction, misapplied the apposite case law and in so doing, has misdirected the thrust of the Fourth Amendments prohibition against unreasonable searches and seizures. The argument herein focuses on the validity of Smith's "consent" to the search of Markham's leased room in a privately owned warehouse.

It is a well settled proposition under constitutional law that the right of privacy encompassed by the Fourth

Amendment is personal and may not be waived except by that person to whom it belongs. *Davis v. United States,* 328 U.S. 582 (1945); and *Zap v. United States,* 328 U.S. 624 (1945). There is a single exception to the established rule, and that exception occurs when it is shown that two or more persons have equal rights in the property to be seized or the place to be searched. *United States v. Sferas,* 210 F. 2d 69 (7th Cir. 1954), cert den. 347 U.S. 935; *United States v. Goodman,* 190 F. Supp. 847 (D.C. Ill. 1961); *United States v. Eldridge,* 302 F. 2d 463 (4th Cir. 1962); *Cutting v. United States,* 169 F. 2d 951 (9th Cir. 1958); and *Sartain v. United States,* 303 F. 2d 859 (9th Cir. 1962).

In the matter at bar, the Government asserted and the Court of Appeals concluded that the consent to search Markham's warehouse space, given the agents by Frank Smith, was valid on the grounds that Smith possessed equal rights to the premises and that his possession and control of the premises was co-equal with that of Markham. Thus Markham could have no expectation of privacy. The conclusion, according to the apposite case law, is patently erroneus. The record reveals the following: (1) Able Warehouse was owned and operated by one Thomas Wisniewski. (2) Petitioner Markham entered into a lease agreement with Wisniewski for the use of particularly described space at Able Warehouse (See: Govt. exhibit 17); (3) Frank Smith was employed as a fork-lift operator at Able warehouse; (4) The record is void of any evidence to support the conclusion that Smith had any proprietary rights in the premises at Able Warehouse; (5) The record is void of any evidence which would tend to establish that Smith had been delegated the authority to manage the property known as Able Warehouse, or to exercise any control over

the premises outside the limitations of his duties as a fork-lift operator.[5]

This Court has considered the exact proposition at law presented herein on several occasions. In *Jones v. United States,* 362 U.S. 257 (1960), the accused was in the apartment of a friend who had given him permission to use it. The premises were searched by federal officers and a quantity of narcotics were found and seized. Jones was arrested and charged with violating the federal narcotics law. Subsequent to conviction and affirmation of said conviction in the Court of Appeals, this Court ruled that anyone on the premises where a search occurs may challenge its legality by way of a motion to suppress, when the fruits of the search are proposed to be used against him. "In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a person aggrieved by an unlawful search and seizure."

Although *Jones* primarily concerns the rule related to standing to challenge a search, the decision is of great import to the question of third party consent to search and seizure. *Jones* significantly extends the scope of Fourth Amendment protection and declares that the rules of property law in which the control test is rooted, must not be permitted to infringe upon the sanctity of an individual's constitutional rights.

In *Chapman v. United States,* 365 U.S. 610 (1961), a lessor summoned state police officers after detecting the odor of whisky mash and requested a search of the leased

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[5] Smith testified that he consented to the search because he thought that by so doing he would be complying with the wishes of his employer (Tr. at 20, 21). However, it is significant that the Government failed to produce Wisniewski as a corroborating witness to the implied largess of his employee.

premises. The police, acting upon the lessor's request, found an unregistered still and a quantity of mash, and arrested the lessee when he returned. Thereafter, federal officers, acting without a warrant, seized the evidence which was later admitted into evidence over the defendant's objections.

This Court reversed, holding that the search and seizure was illegal. The Court stated that there was no justifiable reason for the officers failing to obtain a search warrant. The Court likewise rejected the contention that a landlord's absolute right to enter leased premises to view waste could be delegated to police officers. The Court cited the *Jones* warning that property law should not be permitted to infringe upon the constitutional rights of the individual to be free from unreasonable searches and seizures.

In *Stoner v. California,* 376 U.S. 483 (1964), this Court provided additional insight on the issue of third party consent searches. Stoner was convicted of armed robbery. At the trial, the court, over the defendant's objections, admitted into evidence several articles seized by the police from his hotel room during a search consented to by the hotel clerk. This Court unanimously held that the search was unlawful because it was neither justified as incident to a lawful arrest nor rendered lawful by the hotel clerk's consent:

> "Our decisions make it clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of apparent authority . . . It is important to bear in mind that it was petitioner's constitutional right which was at stake here and not the night clerk's or the hotel's. It was a right, therefore, which only the petitioner could

> waive by word or deed, either directly or through an agent. It is true that the night clerk clearly and unambiguously consented to the search. But there is nothing in the record to indicate that the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room."

The *Stoner* decision clearly recognized the personal nature of one's Fourth Amendment rights. The case is on all fours with the matter at bar. Here, the record reflects that Markham had executed a valid lease with the owner of Able Warehouse contracting for the exclusive use of particularized storage space. Smith, subsequently consented to the agents request to search said space without a warrant. There is nothing in the record to support the conclusion that Markham had ever given Smith permission to permit anyone to search his room, and there is nothing to support the conclusion that the police had any reason to believe that Markham had given such permission. Smith then, takes on the same character as the night clerk in Stoner. He is an employee who consented to a search by police, thus effectively waiving the constitutional rights of the defendant, a position that is expressly prohibited by the apposite decisions of this Court as set out in *Davis v. United States, supra; Zap v. United States, supra; Jones, supra; Chapman, supra;* and *Stoner.*

In affirming Petitioners conviction, the Seventh Circuit relied on two cases which are not only factually distinguishable, but completely inapposite to the issue presented therein. In *United States v. Eldridge,* 302 F. 2d 463 (4th Cir. 1962), the issue polarized upon the consent to search an automobile which belonged to the defendant but which had been loaned to one Nethercott. The panel held, (with

Boreman, J dissenting), that Nethercott "was clothed in rightful possession and control and could do in respect to the automobile whatever was reasonable and not inconsistant with its entrustment to him." Continuing, the court reasoned, "Although the defendant knew of the presence of the stolen radios in the trunk, he apparently did not think it worthwhile to take the precaution of forbidding his bailee to open the trunk or permit anyone to look into it. He reversed no exclusive right of privacy in respect to the trunk when he delivered the key. In responding as he did to the police, Nethercott did not exceed the authority Eldridge had seemingly given him."

The dissent in *Eldridge* is illuminating. Judge Boreman reasons as follows:

> "It is well recognized however, that, as a general rule, whether there is reasonable ground for the search is to be determined prior thereto by an impartial official authorized to issue warrants, not by a police officer who may be overzealous in the performance of his law enforcement duties. (Citations omitted.)
>
> "A search is unreasonable within the meaning of the Fourth Amendment unless (1) authorized by a valid search warrant; (2) incident to a valid arrest; (3) or is made in other exceptional circumstances which dispense with the need for a search warrant. (Citations omitted.)
>
> "In the case at bar, the search of Eldridge's car was not authorized by a valid search warrant . . ."
>
> "Furthermore, there was no arrest, lawful or otherwise, at the time of the search and consequently the authority for a search . . . as incident to a lawful arrest is absent."

> "The Government seeks to validate the search and the use of the seized evidence against Eldridge by Nethercott's consent to the search. Of course, it is conceded that where a *defendant* gives consent to a search of his own property (whether owned, rented or otherwise occupied or controlled), the need for a search warrant is obviated. An entirely different question is posed where the police rely on the consent of one person to validate a search in the course of which evidence is seized and later used against another person having standing to seek suppression of the evidence but who did not consent to the search. The issue then is whether the person against whom the evidence is to be presented in a criminal prosecution is to be bound by the consent of another to the search.
>
> "This search was an exploratory one, made solely in the hope of finding stolen guns in a particular automobile . . . '[T]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.' *Go-Bart Co., v. United States,* 282 U.S. 344. The record does not reveal any 'exceptional circumstances' to justify this search and seizure." 302 F. 2d at 466, 467, 468.

The decision in *Eldridge,* then pivots on the court's conclusion that Nethercott possessed sufficient and co-equal right to consent to the search even though his control over the vehicle was temporary. There is no showing in the record at bar that Frank Smith possessed any rights to control or possession of Markham's leased space. *Eldridge* offers no support for the decision to affirm in the court below.

The Seventh Circuit also cites *Von Eichelberger v. United States,* 252 F. 2d 184 (9th Cir. 1958), as supportive of affirmation. A close examination of the case reveals that reliance upon the merits is misfounded. Quoting from the court's opinion in *Von Eichelberger:*

> "After the transfer of possession from von Eichelberger to Terzian, he, Terzian, stored the guns in a garage belonging to and under the control of one Trost. Later, Trost summoned Government investigating agents who entered Trost's garage at his request and opened the boxes in which the guns were contained. They had no search warrant.
>
> The premises were entirely under Trost's control. He alone had a key. He willingly and voluntarily granted permission for the agents to enter and search. This was a search with the permission of the person in charge of the premises. (Citations omitted.)
>
> Neither von Eichelberger nor Terzian were lessees or owners of the premises searched, nor can they be said to be lawful occupants of the premises . . . '[T]he question seems well settled * * * that one who is not the owner, lessee, or lawful occupant of the premises searched cannot raise the question under the Fourth Amendment of unlawful search and seizure.' *Kwong How v. United States,* 71 F. 2d 71, 75 (9th Cir. 1934)."

From the foregoing, it would appear that had either Terzian or von Eichelberger possessed proprietary rights in the Trost garage, the issue would have changed complexion. Notwithstanding the opinion therein, the finding of the court as well as the underlying facts are not apposite to the matter at bar.

Finally, the Seventh Circuit relied heavily upon this Court's recent decision in *United States v. Matlock*, 42 U.S. L.W. 4252 (1974), to support affirmation. Petitioners herein submit that the court below has misconstrued the thrust of this decision, and the reasons therefore are fully set out under issue III, post.

On the foregoing facts and relevant case law, Petitioners respectfully suggest that the District Court erred in overruling the Motion to Suppress evidence wherein said evidence was obtained absent a warrant and upon the consent of a third party whose authority to consent thereto is not established under the current application of the law in support of Fourth Amendment protections. The affirmation of Petitioners convictions in the court below should be reversed.

II.

DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY PERMITTING INTO EVIDENCE, CERTAIN ITEMS SEIZED WITHOUT A WARRANT AND PURSUANT TO AN EXPLORATORY SEARCH MADE PRIOR TO OBTAINING MARKHAM'S ALLEGED VOLUNTARY CONSENT TO SEARCH HIS PRIVATELY LEASED PREMISES IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION?

The record herein reflects that on March 26, 1973, Special Agents Flanagan and Freiman went to Markham's house in Tinley Park, Illinois, where they allegedly informed Markham that he was a suspect in the theft of Black and Decker lawn trimmers travelling in interstate commerce. At the suppression hearing held prior to trial, the facts underlying the agents visit to the Markham residence are in dispute. However, Petitioners maintain, that even taking the agents testimony as being completely true, the subsequent search conducted at Able Warehouse is indelibly

tainted. In addition, the record further reflects that the trial court failed to rule on the validity of Markham's alleged voluntary consent to the search. (See: Hearing Tr. at 77, 78).

The record reveals that subsequent to some discussion relative to the theft of the Black and Decker merchandise, Flanagan and Freiman "suggested" that Markham accompany them to Able Warehouse to "inspect" the space Markham leased there. Markham accompanied the two agents in their car. Upon arriving at Able Warehouse, the agents advised Markham that they intended to search the premises and that they wanted his consent to do so. The record at this point is in dispute. Flanagan testified that he requested that Markham execute a consent to search form, and that Markham agreed to sign the form freely and voluntarily. Markham, on the other hand, testified that Flanagan produced the form, demanded execution of the consent to search, and further advised Markham that he was aware of the contents of the room, anyway, because of the search conducted the previous Friday. Notwithstanding which account is held to be factual, Markham executed the consent to search form; the agents proceeded into the warehouse and confiscated the Black and Decker cartons. Markham was not arrested subsequent to the seizure.[6]

The facts underlying the issue at bar are as follows:

1. Agent Flanagan conducted a search of Markham's leased warehouse space on Friday, March 23, 1973, without a warrant.

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[6] On August 29, 1973, a warrant issued for the arrest of Markham and the two co-defendants. The warrant was executed on August 30th and defendants were released on bail.

2. The alleged contraband discovered subsequent to the March 23rd search was effectively seized pursuant to Flanagan's orders.

3. Flanagan and another agent "interviewed" Markham at his home on Monday, March 26, 1973; whereupon Markham was "invited" to accompany the agents on an "inspection" of his warehouse space.

4. Flanagan was totally aware of the contents of Markham's warehouse space at the time he requested (or demand) Markham's consent to search.

5. Markham was not placed under arrest at the point of seizure.

6. Flanagan did not possess a warrant to search the premises at Able Warehouse, nor was an application made for said warrant.

The question raised herein focuses on the activity of Agent Flanagan between the time he received his information relative to the involvement of the accused and the execution of the consent to search form by Petitioner Markham. It is Petitioners position that Flanagan's activity during said period fatally taints the alleged voluntary consent to search. The record supports this position. It is clear and uncontroverted that Flanagan failed to apply for a search warrant on Friday, March 23rd; and it is equally clear that Flanagan caused, under the color of his office, a search and seizure to be made on that date at Able Warehouse. On Monday, March 26th, Flanagan interviewed Markham; advised him that he is a suspect in an alleged theft from interstate commerce and "invites" Markham to drive to his warehouse for the purpose of inspecting the premises. Upon arrival at the warehouse, Flanagan persuaded Markham to execute written consent to search

the premises. If we take Flanagan's testimony as being completely true, then it is established that Flanagan failed to advise Markham of his visit to the warehouse the previous Friday and of the fact that Flanagan had already conducted his search and knew that the contraband was there. (Tr. 284). Flanagan also admitted that he had not sought a search warrant on Monday, March 26th.

Petitioners herein contend that the execution of the written consent to search by Markham was nothing more than an attempt by Flanagan to legitimatize an already illegal search; that an experienced agent such as Flanagan was, would know that the initial search conducted on the 23rd violated the provisions of the Fourth Amendment as well as Rule 41, Federal Rules of Criminal Procedure with the potential result being that the agents case against the defendants had been prejudiced by his failure to seek and obtain a valid warrant to search the premises at Able Warehouse.

As was demonstrated in the argument in support of issue I, ante, the right of privacy encompassed by the Fourth Amendment is personal and may be waived except by that person to whom it belongs. *Davis v. United States,* 328 U.S. 582 (1945); and *Zap v. United States,* 328 U.S. 624 (1945). Yet, even though it is possible for a criminal suspect to waive his right to privacy in relation to a search and seizure, such a waiver must be executed freely, vountarily, and without a hint of deception or coercion. *Gouled v. United States,* 255 U.S. 298 (1921); *United States v. Bland,* 458 F. 2d 1 (5th Cir. 1972); *United States v. Jaskiewicz,* 433 F. 2d 415 (3rd Cir. 1970); *United States v. Prudden,* 424 F. 2d 1021 (5th Cir. 1970); *Spahr v. United States,* 409 F. 2d 1303 (9th Cir. 1969); *Cohen v. United States,* 405 F. 2d 34 (8th Cir. 1968); and *United States v. Sclafani,* 265 F. 2d 408 (2nd Cir. 1959).

The record here reveals that the search conducted on March 26th was neither incident to a valid arrest nor pursuant to a warrant. For this search to be upheld it would be necessary to show that Markham voluntarily consented to it. The ground rules for determining whether purported consent validates a search are well known: the consent must be seen to be an "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1937). It must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion. *Simmons v. Bomar,* 349 F. 2d 365 (6th Cir. 1965). And, in such cases, it is incumbent upon the Government to show that the consent obtained was the exercise of a free and voluntary choice. *Bumper v. North Carolina,* 391 U.S. 543 (1968); *Montana v. United States,* 332 F 2d 987 (9th Cir. 1964); *Simmons v. Bomar, supra.*

In affirming Petitioners conviction, the Court of Appeals ruled:

> "Markham had previously been informed that he was a suspect in the case, and he had received *Miranda* warnings. He voluntarily accompanied the agents to the warehouse. Most significantly, he was advised that he could refuse to consent to the search, yet he decided to execute the consent form. Even if the FBI agents had advised Markham that it was not necessary for him to consult with a lawyer in order to give his consent to search and that the agents had already determined that he was storing stolen goods at the warehouse, these factually true statements do not evidence duress, coercion, chicanery, or threats—factors which courts have traditionally examined to determine whether consent was freely and voluntarily granted. Moreover, we reject any suggestion in *Higgins v. United States,* 209 F.

> 2d 819 (D.C. Cir. 1954), that one claiming innocence cannot voluntarily consent to a search when he knows that which is sought is certain to be found. Rather, we agree with the First Circuit that 'the pressure exerted on a criminal by the realization that the jig is up is far different from the deliberate or ignorant violation of a personal right that renders apparent consent ineffective.' (Citation omitted.) Markham may well have believed that the seizure of the stolen goods was inevitable or that cooperation with the FBI would serve his interests." (Citation omitted.) (Op. of the Court at 5, 6.)

Seemingly, the Court of Appeals has overlooked several significant details which evolved at the trial in the District Court. First, there is a disputed record on the claim that Markham "volutarily" agreed to accompany the agents to Able Warehouse, and even the trial court made reference to the dispute while at the same time failing to delve deeper into the fact circumstances:

> "Now, insofar as the statements are concerned, there is a conflict in the testimony. There isn't enough to convince me that he wasn't advised of his rights immediately. I don't know why in the world they would wait until they started out of the house to tell him about it. Its a conflict in the evidence and so far as I am concerned, the motion is denied."
> (H. Tr. at 78.)

Second, Russell Johnson testified at trial that he delivered the Black and Decker cartons to Able Warehouse and turned them over to one "Frank" (Tr. 193); yet, the only "Frank" encountered in this record is Frank Smith who emphatically denied any knowledge whatsoever re-

garding receipt of the lawn trimmers. (Tr. 272, 273). In addition, Smith testified that he could not account for the fact that the trimmers were found in Markham's storage space on the grounds that neither he, nor any of the other Able employees had put them there. (Tr. 270, 271). Smith also stated that he had not seen Markham for more than a week prior to the 20th of March, 1973. (Tr. 273).

Thus, from the record, it is entirely possible that Markham had no knowledge that the merchandise the agents were seeking was actually stored in his warehouse space. This theory is certainly as plausible as the premise relied upon by the Government and the Court of Appeals to support the proposition that Markham realized that the "jig is up" notwithstanding the verdict of the jury. While the conflicts in the trial testimony are matters to be resolved by the jury, it would appear inconsistent to rely upon such a conflict to support affirmation.

Two elements of the issue at bar remain unresolved: (1) why did an experienced Government agent fail to make application for a search warrant subsequent to the interview with Russell Johnson; and (2) accepting the Government's proposition that the March 23rd search was valid, why then was it necessary for Flanagan to approach Markham and gain his consent to search the premises the second time? The record contains no illumination on either question. Flanagan freely admitted that at no time did he seek or obtain a warrant to search the Markham space at Able Warehouse and the inquiry was terminated at that point. Likewise, Flanagan offered no reason for the confrontation with Markham on the 26th of March, and the subsequent search of the warehouse. It would appear (again, assuming that the first search was valid) that Flanagan had all of the necessary elements to obtain an arrest warrant and subsequent indictment prior to the 26th

of March. He had the full confession of one of the theives along with the promise of future cooperation; he had seized the substantive evidence at Able Warehouse; and he knew the identity of the other participants. The next logical step would seem to have been to present his case to the U.S. Attorney; take the evidence to the Grand Jury and secure an indictment. Yet, that is not what the record reflects. The Grand Jury returned its indictment against these Petitioners on August 29, 1973, and the accused were arrested on August 30, 1973, some 157 days subsequent to Flanagan's final search of Abel Warehouse and the seizure of the Black and Decker lawn trimmers.

The "why" to both questions stated above may be supplied if the activity of Flanagan is viewed in the light of the record. There is no question that Flanagan was an agent of more than adequate experience in the investigation and evaluation of federal crimes. In addition, it is well known that FBI agents are meticulously trained not only in the elements of investigation, and evidentiary support, but in the smooth and careful preparation of the cases passed on to the prosecuting authorities. Moreover, the vast majority of agents are carefully trained in the law and/or related areas such as accounting and finance. With this in mind, it is respectfully suggested that Flanagan knew that he had overstepped the investigative parameters of his office by failing to secure a search warrant on March 23rd. Following this, it was necessary to remove the taint of the illegal search in order to preserve his case. The results are a matter of record. A second search, without a warrant, but this time with the "consent" of Markham. It is respectfully suggested that the attempt to remove the taint of a prior, warrantless, illegal search by securing a suspects "consent" to search flies in the face of the protections prescribed by the Fourth Amendment. It is further suggested that this type of activity on the part of an

investigating agent of the Government is exactly that which has been proscribed by this Court by officers "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10 (1948).

The Fourth Amendment requires that a consent to search must be freely and voluntarily given; and devoid of any hint of coercion, either implicit or explicit, by implied threat or covert force. For no matter how subtly the coercion is applied, the resulting consent would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. A classic admonition may be found in *Boyd v. United States,* 116 U.S. 616 at 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and the slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of the person and property should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to a gradual depreciation of the right, as if it con ted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

To hold that the consent to search Able Warehouse given by Markham was voluntary and intelligently given, undermines the thrust of the protections guaranteed by the Fourth Amendment. To hold that it was legal for Flanagan to conduct an illegal search on Friday, and to use the knowledge gained therefrom to secure a "consent" to

search again would open the door for a total abridgement of the warrant requirement postulated in the Fourth Amendment.

From the record, it is certain that Flanagan entered the premises at Able Warehouse on March 23rd, without a warrant and effectively caused the merchandise in issue to be seized. From the record, we also know that Flanagan was successful in obtaining Markham's "consent" to search the same premises again on March 26th. It flies in the face of logic that the consent was a free and voluntary exercise of independent judgment on the part of Markham. On the record before this Honorable Court, it is respectfully suggested that the alleged voluntary consent to search Able Warehouse for the second time cannot remove the taint of the original warrantless, illegal search. *Judd v. United States,* 190 F. 2d 649 (D.C. Cir. 1951); *Channel v. United States,* 285 F. 2d 217 (9th Cir. 1960); *Higgins v. United States,* 209 F. 2d 819 (D.C. Cir. 1953); *Bumper v. North Carolina,* 391 U.S. 543 (1968); *Johnson v. United States,* 333 U.S. 10 (1948); *Alderman v. United States,* 394 U.S. 165 (1969); and *Wong Sun v. United States,* 371 U.S. 471 (1963).

It is respectfully that the purpose for the interview with Markham on March 26, 1973, and the obtaining of Markham's consent to search Able Warehouse was nothing more than subterfuge employed by agent Flanagan in an effort to rehabilitate any prior illegal search and seizure. The exercise of such procedure is expressly prohibited by the Fourth amendment and the evidence gained thereby should have been suppressed. Petitioners herein urge that the the trial court erred in permitting the Black and Decker lawn trimmers into evidence. The affirmation of conviction set out by the Court of Appeals for the Seventh Circuit should be reversed.

III.

DID THE COURT OF APPEALS MISCONSTRUE AND MISAPPLY THE THRUST AND INTENT OF THIS COURT'S RECENT DECISION IN UNITED STATES v. MATLOCK, 415 U.S. 164, 42 U.S.L.W. 4252 (1974)?

The record reflects that the Court of Appeals affirmed Petitioner's conviction on the grounds that the search conducted by FBI agents on March 23, 1973, was legal and that the agents had obtained the valid and binding consent of one Frank Smith, an employee of the warehouse owner. In so ruling, the panel compares the search therein with that conducted by agents and police officers of a private house and a room rented within the house as set out in *United States v. Matlock,* 415 U.S. 164 (1974). The matter at bar and the Matlock case are not comparable on the facts; nor is Matlock a case which is determinative of the issues presented herein. In the instant matter, we are concerned with the warrantless search of warehouse space which had been leased to Petitioner Markham by the owner. The space was completely enclosed, and the door was supplied with a lock. Instructions to the warehouse employees included keeping the space locked for the protection of Markham's goods. On the other hand, the Matlock case involved the search of a room in a private dwelling house which had been rented to the defendant but shared by the defendant's girl friend who had equal access to the room and its possessions.

The case came on direct appeal to the Court of Appeals for the Seventh Circuit, and involved the following fact background. There were three searches conducted during the same day subsequent to the arrest of the defendant for bank robbery. During the first search, the police were

admitted to the house by one Graff. During the search conducted therein, the police discovered and seized $4,995.00 and other items from a closet and dresser drawer located in a second floor bedroom. At the hearing on the motion to suppress, the trial court determined that Graff was Matlock's girlfriend and that they shared the second floor bedroom. It was further found that Matlock had entered into a rental agreement with the owner of the house and had paid her a specific sum of money each week for room and board. On these facts, the District Court held that even though there was joint occupancy of the second floor bedroom, Graff did not possess the requisite authority to consent to a search of that room. (476 F. 2d at 1086). The District Court ordered the evidence suppressed and the Seventh Circuit affirmed.

> "In our view, Judge Doyle has simply articulated the correct principle which courts until now have applied without clear articulation thereof. He correctly held that defendant's constitutional rights could be waived only if it was proved that reasonable appearance of authority to consent existed and, also, that just prior to the search facts existed showing actual authority to consent."
>
> *United States v. Matlock,* 476 F. 2d 1083 (7th Cir. 1973).

The Government sought certiorari, and this Court granted the Petition to consider the question: "whether the evidence presented by the United States with respect to the voluntary consent of a third party to search the living quarters of the respondent was legally sufficient to render the seized materials admissable in evidence at the respondent's criminal trial." (per Mr. Justice White, 415 U.S.

at 166). The Court reversed the order suppressing evidence on the following rationale:

> "The District Court ruled that before the seized evidence could be admitted at trial the Government had to prove first, that it reasonably appeared to the searching officers 'just prior to the search, that facts exist which will render the consenter's consent binding on the putative defendant,' and second, that 'just prior to the search, facts do exist which render the consenter's consent binding on the putative defendant.' There was no requirement that express permission from respondent to Mrs. Graff to allow the officer to search be shown; it was sufficient to show her authority to consent in her own right, by reason of her relationship to the premises. The first requirement was held satisfied because of respondent's presence in the yard of the house at the time of his arrest, because of Gayle Graff's residence in the house for some time and her presence in the house just prior to the search, and because of her statement to the officers that she and respondent occupied the east bedroom.
>
> "The District Court concluded, however, that the Government had failed to satisfy the second requirement and not satisfactorily proved Mrs. Graff's actual authority to consent to the search."

Mr. Justice White, in writing for the Court, outlined in detail the historical construction of the Court's holdings which permits the voluntary consent of any joint occupant of a residence to search the premises jointly occupied as being valid against the co-occupant, and would permit evidence seized therein to be used against the co-occupant at a criminal trial. Petitioners herein do not take issue with

the Court's long standing position on co-occupant consent searches. However, that is not the issue at bar. In reversing the Court of Appeals affirmation of the District Court's order to suppress certain evidence, Mr. Justice White speaks as follows:

> "These cases at least make it clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected."

Relative to the foregoing, Mr. Justice White distinguished the Court's holding in the following footnote:

> "Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third party consent does not rest upon the law of property, with its attendant historical and legal refinements, see *Chapman v. United States,* 365 U.S. 610 (1961) (landlord could not validly consent to the search of a house he had rented to another); *Stoner v. California,* 376 U.S. 483 (1964) (night clerk could not validly consent to search of customer's room) but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any one of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."
>
> (415 U.S. at 171 n. 7).

Thus it is clear that the Court, per Mr. Justice White, excluded the type of search conducted in the matter at bar from that under consideration in *Matlock*. In *Matlock*, the search was conducted after the arrest of the defendant, who was on the premises; in a private residence; and with the permission of a co-inhabitant of the room in question. Here, the search was made in a warehouse; no arrest was made; and the consent given by an employee of the warehouse owner. On the facts of each case, *Matlock* is simply inapposite to the matter at bar.

Apparently, the Seventh Circuit, responding to the Court's reversal in *Matlock*, construed the decision to encompass *all* third party consent searches; a position which this Court did not intend. It is clear that the foregoing footnote distinguishes the type of third party consent that the Court, in *Matlock*, was concerned with.

The consent of Frank Smith, the Able Warehouse employee, falls well outside the the third party consent described in *Matlock*, and within the four corners of this Court's decisions in *Chapman* and *Stoner*. The effect of the Seventh Circuit's interpretation of *Matlock* is to substantially overrule the proposition of law set out in both *Stoner* and *Chapman*, a proposition clearly unintended by the *Matlock* majority.

It is respectfully suggested that certiorari be granted for the purpose of reviewing the Seventh Circuit's interpretation of the *Matlock* decision so as to prevent a misapplication and misinterpretation of this Court's current position relative to third party consent searches. It is also suggested that should the Seventh Circuit's interpretation be permitted to stand, the result will constitute a paramount injustice to Petitioners herein.

7. CONCLUSION

Wherefore, by reason of the foregoing premises, Petitioners pray that this Honorable Court issues a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and order this cause to be reversed and remanded.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
Northern District of Illinois

(Filed December 1, 1973)

United States of America, Plaintiff, vs Delmar L. Markham, Defendant.	}	CR: 73-651

NOTICE OF APPEAL

Notice is hereby given that Delmar L. Markham, defendant above-named, appeals to the United States Court of Appeals for the Seventh Circuit, from the Judgment of Conviction entered in this cause on December 19, 1973, by the Honorable Bernard Decker, Judge of the United States District Court.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September Term, 1973 — April Session, 1974

Nos. 73-2137, 73-2138 United States of America, *Plaintiff-Appellee,* v. Bruno Anthony Piet and Delmar L. Markham, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. (73-CR-651)

OPINION

Bernard M. Decker,
Judge.

Argued April 19, 1974—Decided May 20, 1974

Before Swygert, *Chief Judge,* Castle, *Senior Circuit Judge,* and Sprecher, *Circuit Judge.*

Castle, *Circuit Judge.* Defendants Bruno Piet and Delmar Markham appeal their jury convictions on one count of unlawfully possessing goods stolen from interstate commerce, a violation of 18 U.S.C. § 659.[1] On appeal, Piet and Markham assert that the indictment was insufficient to state an offense, that the evidence was insufficient to prove that Piet possessed stolen goods, that the district court erroneously denied a motion to suppress the stolen goods

[1] The appeals of Piet, No. 73-2137, and Markham, No. 73-2138, were consolidated for purposes of oral argument and this opinion.

from evidence, and that the government permitted a key witness to perjure himself in denying the existence of a plea bargain. We have considered these issues, and we affirm the convictions.

On March 19, 1973, Russell Johnson, a truck driver, while making a delivery to the Chippewa-McClain Motor Freight Co. of Bedford Park, Illinois, agreed to receive some Black and Decker lawn edgers from Bruno Piet, a Chippewa dock hand; the two men agreed to split the proceeds from Johnson's planned sale of the edgers. Later, Johnson telephoned Delmar Markham to inquire whether he could "use" the edgers, and Markham directed Johnson to transport them to the Able warehouse. The men fixed the sale terms, and subsequently, Johnson found $124 at the location where he had asked Markham to deliver payment. On March 21, Markham telephoned Frank Smith, acting warehouse foreman, and requested that one-half of the edgers be separated; Markham picked up these edgers later that afternoon.

Piet claims that the indictment was insufficient to state an offense because it specified the precise location of the theft, rather than any particular facility enumerated in the statute. This court rejected a similar contention in *United States v. D'Antonio,* 342 F2d 667 (7th Cir. 1965), in finding that "a dock of Day's Transfer Co." referred to facilities set forth in the statute. Similarly, "Chippewa-McClain Motor Freight Company, Bedford Park, Illinois" connotes such statutory terms as "platform or depot," "station" and "storage facility." *United States v. Knight,* 451 F.2d 275 (5th Cir. 1971), *cert. den.,* 405 U. S. 965 (1972), a case indistinguishable from ours, found that an indictment specifying "Yellow Freight System terminal" was sufficient because there was no significant distinction

between the words of the indictment and those of the statute. *Accord, Dunson v. United States,* 404 F.2d 447 (9th Cir. 1968), *cert. den.,* 393 U. S. 1111 (1969). *United States v. Manuszak,* 234 F.2d 421 (3rd Cir. 1956), on which the defendants rely, is inapposite, for the indictment there failed to specify *any* specific facility or place from which the goods had been stolen. We find that the indictment sufficiently apprised the defendants of the nature of the crime with which they were charged. *See, Hagner v. United States,* 285 U. S. 427 (1932).

Piet also argues that his indictment represents an unwarranted extension of federal jurisdiction beyond the scope of congressional intent in drafting the statute. We cannot agree. "The language of section 659 evidences a clear purpose to reach depredations affecting any conceivable instrumentality by which the interstate transportation of freight may be accomplished." *Dunson v. United States, supra,* at 448. That Congress is empowered to protect interstate commerce by proscribing possession of goods stolen from interstate shipment is beyond cavil, *see Wickard v. Filburn,* 317 U. S. 111 (1942); whether such power was wisely exercised through the enactment of section 659 is clearly improperly addressed to this branch of government.

Piet next contends that the evidence was insufficient to establish that he was in actual possession of the lawn edgers; therefore the court improperly denied his motion for a judgment or acquittal. Viewing the evidence in the light most favorable to the government, *Glasser v. United States,* 315 U. S. 60 (1942), we find there was sufficient evidence for the jury to determine that Piet had possession of the edgers, as charged in the indictment. After determining on March 19, 1973 that Johnson would accept any merchandise which Piet might be able to supply to

him, Piet learned from a co-worker that a load of Black and Decker lawn edgers, marked "Richmond freight," was lying on the dock. Piet then told Johnson that he would try to load the edgers on the back of Johnson's trailer. Thereafter, Piet was seen loading the lawn edgers into a truck. From this evidence, the jury could properly infer that Piet had established the requisite dominion and control over the property at issue. *Accord, United States v. Parent,* 484 F.2d 726 (7th Cir. 1973); *United States v. Catalano,* 450 F.2d 985 (7th Cir. 1971), *cert. den.,* 405 U. S. 928 (1972). The case is therefore distinguishable from *United States v. Nitti,* 444 F.2d 1056 (7th Cir. 1971), where the court expressly noted that the defendant had no knowledge of the stolen property.

Markham contends that his motion to suppress the lawn edgers from evidence was erroneously denied because (1) the March 23, 1973 FBI inspection of the Able warehouse storage room in which Markham's goods were kept was unlawful, (2) that inspection tainted the March 26, 1973 search and seizure of Markham's goods stored at the warehouse, and (3) Markham's consent to the March 26 search was improperly induced. Respecting the first point, Markham asserts that Frank Smith lacked the authority to permit FBI agents to inspect a storage room at the warehouse in which Markham's goods were commingled with those of others who leased space at the facility. In *United States v. Matlock,* — U.S. —, 42 USLW 4252 (U.S., Feb. 20, 1974), the Supreme Court reiterated that permission to search may be obtained from a third party who possessed either common authority over or other sufficient relationship to the premises or effects. "The authority which justifies third-party consent does not rest on the law of property . . . [but rather] on mutual use of the property by persons generally having joint access or control for most purposes."

Id. at 4254 n. 7. Frank Smith introduced himself as the warehouse foreman and stated that he was in charge in the owner's absence. Smith also told the FBI agents that he had one of two keys to the common storage area where Markham's goods were kept and that Markham did not have a key to the facility. Smith freely consented to the FBI search, and he led the agents to the area where Markham's goods were stored. From the labels on the Black and Decker cartons, the agents ascertained that the boxes contained the stolen lawn edgers. The agents then left the warehouse. Whatever Smith's position, it is clear that Markham was aware, as a practical matter, that Smith and the warehouse owner—who possessed the only keys to the common storage room—had access and control over the common area. We find, therefore, that Markham had no reasonable expection of privacy respecting the storage of his goods, *see, United States v. Eldridge,* 302 F.2d 463 (4th Cir. 1962), and assumed the risk that the persons in charge of the facility might willingly and voluntarily grant permission for agents to enter and search the common storage area. *See, United States v. Matlock, supra; Von Eichelberger v. United States,* 252 F.2d 184 (9th Cir. 1958).

Markham further argues that as the March 26 search and seizure resulted from information gleaned from the allegedly unlawful March 23 search, evidence seized on March 26 must therefore be suppressed. Even if the March 23 search had been unlawful, that investigation would not have tainted the March 26 search and seizure of the edgers. Prior to the March 23 search, Johnson told FBI agents that Markham had directed him to deliver the stolen edgers to the Able warehouse. Thus, an independent basis existed to support the agents' suspicion that Markham was storing stolen goods at the Able facility. *Cf., United States v. San*

Martin, 469 F.2d 5, 8 (2d Cir. 1972), *cert. den.,* 410 U.S. 934 (1973).

Markham's claim that he was improperly induced to consent to the March 26 search is apparently grounded on his assertions that the FBI agents told him that it would be futile to withhold consent to the search since the agents had already determined that the stolen merchandise was there and that it was unnecessary for Markham to call his attorney prior to granting consent. The FBI agents involved denied the first assertion and contended that they told Markham that he was free to call his attorney at which point he changed his mind. First, issues of credibility of witnesses are to be resolved by the trial court, which may observe the witnesses' demeanor at first hand; such issues may not be relegated at the appellate level. Second, even if the trial court had accepted Markham's account, "the totality of all the circumstances" does not indicate that Markham's consent was involuntary. *See, Schneckloth v. Bustamonte,* 12 U.S. 218 (1973). Markham had previously been informed that he was a suspect in the case, and he had received his *Miranda* warnings. He voluntarily accompanied the agents to the warehouse. Most significantly, he was advised that he could refuse to consent to the search, yet he decided to execute the consent form. Even if the FBI agents had advised Markham that it was not necessary for him to consult with a lawyer in order to give his consent to the search and that the agents had already determined that he was storing stolen goods at the warehouse, these factually true statements do not evidence duress, coercion, chicanery or threats—factors which courts have traditionally examined to determine whether consent was freely and voluntarily granted. Moreover, we reject any suggestion in *Higgins v. United States,* 209 F.2d 819 (D.C. Cir. 1954), that one claiming innocence cannot voluntarily

consent to a search when he knows that that which is sought is certain to be found.[2] Rather we agree with the First Circuit that "the pressure exerted on a criminal by the realization that the jig is up is far different from the deliberate or ignorant violation of a personal right that renders apparent consent ineffective." *Gorman v. United States,* 380 F.2d 158, 165 (1st Cir. 1967). Markham may well have believed that the seizure of the stolen goods was inevitable or that cooperation with the FBI would serve his interests. *See, Leavit v. Howard,* 462 F.2d 992 (1st Cir. 1972).

Piet and Markham lastly contend that the record discloses evidence of plea bargaining between the government and its key witness, Johnson, despite Johnson's denial under oath, which the government did not contradict. Had there been a promise to the witness prior to his testimony which was withheld from the jury by the witness and the government, *Giglio v. United States,* 405 U.S. 150 (1972), and *Napue v. Illinois,* 360 U.S. 264 (1959), would require reversal of the convictions. Moreover, if there is evidence of a plea bargain at some point in time, *DeMarco v. United States,* 42 USLW 3520 (U.S., Mar. 18, 1974), would require remand to the district court to determine through an evidentiary hearing whether the plea bargain occurred prior to the giving of testimony. Unlike *DeMarco,* where the prosecutor's remarks at the sentencing of the witness arguably established that a plea bargain was reached with the witness prior to his giving testimony, there is absolutely nothing in the record of the present case to even suggest that a plea bargain was reached between Johnson and the government. While steadfastly denying the existence of a plea bargain both at his own arraignment and at the trial

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[2] This question had been expressly left open in *United States* v. *Hayward,* 471 F.2d 388, 389 (7th Cir. 1972).

of Piet and Markham, Johnson expressed his hope that the court would favorably consider his cooperation with the government in subsequently sentencing him. The mere expression of one's hopeful (and not unreasonable) expectation cannot be equated with concrete indicia of an undisclosed plea bargain. Without any substantive claim that a plea bargain was struck, there would clearly be no basis for ordering an evidentiary hearing to determine the date of such an alleged agreement.

The judgment of the district court is affirmed.

Affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Judy 18, 1974

Before

Hon. LUTHER M. SWYGERT, Chief Judge
Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

Nos. 73-2137 73-2138 United States of America, Plaintiff-Appellee, vs. Bruno Anthony Piet and Delmar L. Markham, Defendants-Appellants.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. 73-CR-651 Bernard M. Decker *Judge.*

ORDER DENYING APPLICATION FOR REHEARING

On consideration of the petitions for rehearing and suggestions that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestions, and all of the members of the panel having voted to deny a rehearing.

It Is Ordered that the petitions for rehearing in the above-entitled cause be and the same are hereby Denied.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-191

DELMAR L. MARKHAM AND BRUNO PIET, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that it was error for the trial judge to refuse to grant their motion to suppress stolen goods as being the product of an illegal search.

After a jury trial in the Northern District of Illinois, petitioners were convicted of unlawfully possessing goods stolen from interstate commerce, in violation of 18 U.S.C. 659. Petitioner Markham was sentenced to a term of three years' imprisonment; petitioner Piet was sentenced to a term of eighteen months' imprisonment. The court of appeals affirmed on May 20, 1974 (Pet. App. B, pp. 42-49). A motion for rehearing was denied on July 18, 1974 (Pet. App. C, p. 50). The petition for a writ of certiorari was not filed until August 28, 1974, and is, therefore, out of time under Rule 22(2) of the Rules of the Court. There is, in any event, no occasion to grant the writ.

The evidence, which is summarized in the opinion of the court of appeals (Pet. App. B, pp. 43-47), shows that on March 19, 1973, Russell Johnson,[1] while making a delivery to the Chippewa-McClain Motor Freight Co. of Bedford Park, Illinois, agreed to receive some Black and Decker lawn edgers from petitioner Piet, a Chippewa dock hand (Tr. 186, 189, 207).[2] The two men agreed to split the proceeds from Johnson's planned sale of the edgers (Tr. 186, 189). Johnson subsequently telephoned petitioner Markham to inquire whether he could "use" the edgers, and Markham told Johnson to transport them to the nearby Able Warehouse (Tr. 191-192). Johnson did as he had been instructed, unloading twenty-eight cartons at the Able Warehouse and retaining one for himself (Tr. 192-193). The men fixed the sale terms, and Johnson subsequently found $124 where he had asked Markham to leave the payment (Tr. 195, 219-220).

On March 21, 1973, Markham telephoned Frank Smith, acting foreman of the Able Warehouse, and asked that he separate one half of the lawn edgers because he planned to pick them up. Markham appeared later that day and loaded 13 cartons of the edgers into his automobile (Tr. 267-268).

On March 23, 1973, F.B.I. agents Flanagan and Roberts questioned Johnson, who admitted participating in the theft and also informed the agents that he had taken the edgers to the Able Warehouse (Tr. 57). The agents

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[1]Johnson, indicted with petitioners, pleaded guilty, testified for the government, and was subsequently sentenced to three years' probation.

[2]"Tr." refers to the transcript of the proceedings in this case, the original of which is being lodged with the Clerk of this Court.

then went to the warehouse, where they were met by Frank Smith, the warehouse foreman (Tr. 20, 59). Smith said that Markham was neither the owner nor an employee, but that he did rent space in a small room in the warehouse (Tr. 25, 59). Smith told the agents that the room in question was a general storage area containing merchandise other than that stored by Markham.[3] Smith and other Able Warehouse employees had access to, and did on occasion enter, the rented room; however, customers were not allowed into the storage areas (Tr. 27, 59-60). Smith additionally told the agents that Markham did not have a key to the storage area because there were only two keys, one of which was held by Smith (Tr. 18, 59).

After first informing Smith that he was under no obligation to show them the room, the agents asked if they could see the area in which Markham rented space (Tr. 20). Smith, indicating that he would be happy to show it, led the agents to the room in the warehouse where Markham rented space and opened the door, which, as was customary, was unlocked (Tr. 18, 26, 60). From the agents' position in the corridor outside of the room a pallet containing Black and Decker cartons was plainly visible (Tr. 60). The agents briefly examined the labels on the cartons and left the warehouse, asking Smith not to allow anyone in the room without authorization (Tr. 61).

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[3]Markham declined Smith's offer to remove the other merchandise, saying that "it wouldn't be necessary at that time as he didn't have that much merchandise" (Tr. 26).

That same afternoon, Markham saw Johnson and asked him if he had talked to the F.B.I. After Johnson replied that he had, Markham angrily berated him for not warning him in advance so that he could have removed the lawn edgers from the warehouse (Tr. 197, 212-213).

On March 26, 1973, the F.B.I. agents visited Markham's home and Markham voluntarily agreed to accompany them to the Able Warehouse (Tr. 284). Before entering the warehouse the agents obtained Markham's written consent to search the area which he leased (Tr. 283). The search revealed fifteen cartons of Black and Decker lawn edgers, which had been stolen from the Chippewa Motor Freight Company, in the space assigned to Markham (Tr. 280). The lawn edgers were then seized and subsequently introduced into evidence against petitioners at their joint trial.

Petitioners contend, for various reasons, that the trial judge should have suppressed the lawn edgers. They allege that the evidence was the product of a warrantless search on March 23, 1973, in violation of the Fourth Amendment, and that Markham's consent to the March 26, 1973, search was improperly induced. They also question the court of appeals' application of *United States* v. *Matlock*, 415 U.S. 164, to the facts of this case. We note initially that Piet has no standing to object to the search, since he was not present at the time of the contested searches, alleged no proprietary or possessory interest in the premises, and was not charged with an offense that included, as an essential element, possession of the seized evidence at the time of the contested search and seizure. *Brown* v. *United States*, 411 U.S. 223, 229. In any event, petitioners' conten-

tions were thoroughly examined and properly rejected by the court of appeals, on whose opinion we rely. That court held (Pet. App. B, pp. 45-56), correctly citing *United States* v. *Matlock, supra,* 415 U.S. at 171, n. 7, that permission to search may be obtained from a third party possessing either common authority over or other sufficient relationship to the premises or effects. It further stated that, on the facts of this case, Frank Smith possessed "access and control over the common area" and thus had the right to permit the inspection and that Markham assumed the risk that such a search might be authorized.

The court additionally stated that Markham's allegation that his consent to the March 26, 1973, search had been improperly induced, was refuted by the facts (Pet. App. B, p. 47).

> Markham had previously been informed that he was a suspect in the case, and he received his *Miranda* warnings. He voluntarily accompanied the agents to the warehouse. Most significantly, he was advised that he could refuse to consent to the search, yet he decided to execute the consent form. Even if the FBI agents had advised Markham that it was not necessary for him to consult with a lawyer in order to give his consent to the search and that the agents had already determined that he was storing stolen goods at the warehouse, these factually true statements do not evidence duress, coercion, chicanery or threats—factors which courts have traditionally examined to determine whether consent was freely and voluntarily granted. * * *

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.